Nos. 90-408 and 90-577

In the Supreme Court of the United States

OCTOBER TERM, 1990

COUNTY OF YAKIMA, ET AL., PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION, CROSS-PETITIONER

v.

COUNTY OF YAKIMA, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the Yakima Nation or individual members of the Yakima Nation.

2. Whether Yakima County may impose its excise tax on sales of real property on the Reservation by the Yakima Nation or its members.

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This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Respondent Confederated Tribes and Bands of the Yakima Nation (Yakima Nation) occupies a Reservation comprising 1,387,505 acres in the State of Washington. The Reservation was established pursuant to an 1855

Treaty, which was ratified in 1859. 12 Stat. 951. Approximately 80% of the Reservation land is held in trust by the United States for members of the Yakima Nation or the Nation itself. The remainder is owned in fee by the Yakima Nation, individual members of the Nation, or nonmembers. *Brendale* v. *Confederated Tribes & Bands of Yakima Nations*, 109 S. Ct. 2994, 3000 (1989) (opinion of White, J.); *Washington* v. *Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 469 (1979).[1]

2. This suit was commenced in 1987 by the Yakima Nation against Yakima County and its treasurer. The Yakima Nation sought an injunction to prevent the County from imposing its ad valorem property tax on lands owned in fee by the Nation or its members within the boundaries of the Reservation and from collecting the state excise tax on sales of such lands by the Nation or its members.[2]

The district court granted summary judgment for the Yakima Nation. Pet. App. 34a-39a. The court relied in particular on *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), where this Court held that Montana could not impose a personal property tax on property of tribal members located within a reservation, assess a vendor license fee on an Indian conducting a business on reservation land, or tax on-reservation purchases of cigarettes by tribal members. Pet. App. 35a, 37a-39a; see 425 U.S. at 475-481.

The Court in *Moe* rejected as "untenable" Montana's argument that the taxes and license fee there at issue were authorized by Section 6 of the General Allotment Act, as revised in 1906, which provides, *inter alia*, that

[1] The district court found that 104 members of the Yakima Nation own 139 parcels of fee patented land. Pet. App. 35a.

[2] The suit was prompted by the County's commencement of tax foreclosure proceedings against several on-Reservation parcels owned in fee by the Yakima Nation or individual members for which taxes were past due for three years. See Pet. 4-5.

Indian allottees "shall have the benefit of and be subject to" the civil and criminal laws of the State at the expiration of the trust period. 25 U.S.C. 349.[3] The Court explained that "[i]f the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size"; that result, the Court explained, would create an "impractical pattern of checkerboard jurisdiction" and conflict with "existing federal statutory law of Indian jurisdiction." 425 U.S. at 478. The Court also concluded in *Moe* that Montana's reliance on Section 6 of the General Allotment Act overlooked the Court's more recent conclusions about that Act's "present effect"—specifically, that although the General Allotment Act was passed for the ultimate purpose of allotting lands to all individual Indians and abolishing reservations, that policy "was repudiated in 1934 by the Indian Reorganization Act [IRA]."[4] 425 U.S. at 479. The Court observed that there was no decisional authority giving the meaning Montana urged to Section 6 of

[3] Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390, as amended by the Act of May 8, 1906, ch. 2348, 34 Stat. 182. Section 6, as amended and codified at 25 U.S.C. 349, states in relevant part:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent * * *.

[4] Act of June 18, 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*

the General Allotment Act "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands," and it therefore declined to validate Montana's taxes on the basis of Section 6. 425 U.S. at 479.

In this case, Yakima County relied on a proviso to Section 6 of the General Allotment Act, which provides that if an allottee is competent and able to manage his affairs, the Secretary of the Interior may, prior to expiration of the statutory trust period, issue the allottee a patent in fee, and "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." This proviso was not quoted in *Moe*. But applying the reasoning of *Moe* to this case, the district court noted that application of Yakima County's ad valorem tax on fee patented lands owned by Yakima Nation members on the Reservation would have a comparable "checkerboard effect," and it concluded that, as in *Moe*, " 'Congress by its more modern legislation has evinced a clear intent to eschew any such checkerboard approach within an existing reservation' ". Pet. App. 38a (quoting 425 U.S. at 479. The Court therefore held that the proviso to Section 6, like the principal clause quoted in *Moe*, did not grant Yakima County jurisdiction to tax fee patented lands owned by the Yakima Nation or its members. Pet. App. 38a-39a.

3. The court of appeals affirmed in part and reversed and remanded in part. Pet. App. 1a-30a.

a. The court of appeals acknowledged that Indians on their reservations are exempt from state taxation unless Congress directs otherwise with "unmistakabl[e]" clarity. Pet. App. 12a (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985)). But it believed that the proviso to Section 6 of the General Allotment Act satisfied that standard. The court acknowledged that *Moe* furnished the "strongest support" for not reading the proviso to authorize such taxation in the face of more modern legislation, Pet. App. 15a, especially since *Moe* declined to

follow *Goudy* v. *Meath*, 203 U.S. 146 (1906), which had relied on the prior version of Section 6 to sustain state taxing jurisdiction over an Indian allottee. But the court below chose to confine *Moe* to the principal clause of Section 6, quoted in the Court's opinion in that case, and not to apply *Moe's* rationale to the proviso. Pet. App. 15a-17a.

The court of appeals emphasized that *Moe* involved state taxation of activities unrelated to land, while the proviso to Section 6 addresses taxation of the land itself. Pet. App. 17a-18a, 26a. Accordingly, although the court acknowledged *Moe*'s holding that the policies of the General Allotment Act were repudiated by the IRA and that Section 6 therefore does not permit state taxation of Indian activities on Indian-owned fee lands on a reservation, it held that because the proviso to Section 6 was not expressly repealed by the IRA, it permits state taxation of the lands themselves. Pet. App. 18a-20a. Similarly, the court was unpersuaded that 18 U.S.C. 1151—which was enacted in 1948 to codify a modern definition of "Indian country" that includes all land within the boundaries of an Indian reservation, "notwithstanding the issuance of any patent"—bars imposition of the County's ad valorem tax. The court believed that 18 U.S.C. 1151 defines "Indian country" only for purposes of criminal jurisdiction and therefore is "not * * * relevant to the question of whether fee patented land may be taxed by the state." Pet. App. 20a-21a; see also *id.* at 24a-25a, 26a.

Although the court of appeals rejected the Tribe's argument that application of the County's ad valorem tax to Indian-owned fee lands on the Reservation is absolutely forbidden by *Moe* and the congressional policy eschewing checkerboard jurisdiction, Pet. App. 23a-27a, it did not actually sustain the tax as applied to such lands. The court noted that after the district court rendered its decision, this Court held in *Brendale* that a Tribe may regulate activities on fee lands owned by non-Indians if

the impact of those activities is "demonstrably serious" and "imperil[s] the political integrity, economic security or the health and welfare of the tribe." *Id.* at 27a (quoting 109 S. Ct. at 3008 (opinion of White, J.)). Although this case is the converse of *Brendale*—inasmuch as it involves an assertion of *state* jurisdiction over fee lands owned by *Indians*—the court of appeals believed *Brendale* to be relevant, because the Yakima Nation had "presented evidence of how the checkerboard jurisdiction that would result from Yakima County's taxation would affect it in a demonstrably serious way. Pet. App. 27a-28a. The court therefore remanded the case to the district court with directions to consider that evidence under the standard it drew from the intervening decision in *Brendale*. *Id.* at 28a.[5]

b. By contrast, the court of appeals found no reason for further proceedings concerning the excise tax, which it held may not be applied to sales of on-reservation fee lands by the Yakima Nation or its members. The court explained that in its view Section 6 of the General Allotment Act authorizes state taxation only of the land itself, while state law imposes the excise tax on the *sale* of the land. Pet. App. 29a-30a.

DISCUSSION

The court of appeals' conclusion that Section 6 of the General Allotment Act might permit Yakima County to impose its ad valorem tax on Indian-owned fee lands on the Yakima Reservation is inconsistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). There, the Court held that a State is barred from taxing

[5] The Yakima Nation filed a petition for rehearing with suggestion of rehearing en banc of the panel's holding that the rationale of *Moe* does not foreclose imposition of the ad valorem tax on Indian-owned fee lands within the Reservation. The United States filed an amicus brief in support of the Yakima Nation at the rehearing stage, taking the same position we present herein. The court of appeals denied rehearing.

personal property owned by Indians or activities engaged in by Indians on a reservation, including on lands owned in fee. It would be anomalous indeed if a State were permitted to tax the reservation land itself (when it is owned by Indians), since land is at the very core of an Indian reservation's existence. Accordingly, courts or agencies in a number of states have concluded that state taxes may not be imposed on Indian-owned fee lands on a reservation. *Battese* v. *Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981); N.D. Op. Att'y Gen. No. 85-12 (1985); Oregon Dep't of Justice, *Taxation of Indian Fee Land* (advice letter dated Mar. 14, 1983); Idaho Tax Comm'n, *Taxation of Lands Within Indian Reservations Which Are Owned by Individual Indians* (June 8, 1982); see also *Estate of Johnson*, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (Dist. Ct. App. 1981) (inheritance taxes), cert. denied, 459 U.S. 828 (1982).

The Ninth Circuit did not definitively hold to the contrary in this case. In fact, it held that the excise tax could *not* be applied to sales of Indian-owned fee land on the Reservation. And although the Ninth Circuit rejected the Yakima Nation's contention that application of the ad valorem tax to Indian-owned fee lands is foreclosed by *Moe* and by more modern legislation (such as the Indian Reorganization Act and 18 U.S.C. 1151), it did not actually sustain the ad valorem tax as applied to such lands. The court instead directed the district court to consider whether the ad valorem tax is barred (notwithstanding the proviso to Section 6 of the General Allotment Act) because, as alleged by the Yakima Nation, the tax would have a seriously adverse impact. Pet. App. 27a-28a. If the courts below so hold, the *result* reached in this case (even if not the reasoning employed) would be consistent with *Moe* and with the result reached by courts and agencies in the other States mentioned above.

Notwithstanding this possible outcome on remand, we believe, on balance, that the Court should grant review

now. As Yakima County points out (Pet. 10), suits similar to this one have been brought by the United States or the Tribe concerned with respect to fee lands on reservations in Montana and South Dakota, and a similar administrative case is pending in Colorado. The same issue will no doubt arise on other reservations and in other States as well. Furthermore, the legal issues presented by the parties are ripe for review and would not be illuminated by the proceedings on remand. Yakima County contends in its certiorari petition that imposition of the ad valorem tax is *authorized* as a matter of law under Section 6 of the General Allotment Act, without any need for the sort of particularized assessment of the impact of the tax that the court of appeals ordered under a test derived from *Brendale* v. *Confederated Tribes & Bands of Yakima Nation*, 109 S. Ct. 2994 (1989). Conversely, the Yakima Nation contends in its cross-petition (and we agree) that imposition of the ad valorem tax to Indian-owned land is *prohibited* as a matter of law under *Moe* and the more modern statutory provisions governing jurisdiction over Indian reservations, without any need for such a particularized assessment. Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be dispositive of this and other pending and future cases, and therefore would obviate the need for potentially protracted and complex litigation regarding the impact of real estate taxes on a case-by-case basis under the *Brendale*-type test fashioned by the Ninth Circuit.

For the foregoing reasons, we urge the Court to grant review now to consider the effect of *Moe* and Section 6 of the General Allotment Act in this setting, and thereby to resolve a question of recurring importance on Indian reservations.

1. a. In most situations involving the application of state law to on-reservation matters affecting Indians, the Court has engaged in a particularized inquiry into the respective federal, tribal, and state interests at stake.

"The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989); *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838-839 (1982); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143-145 (1980).

However, "[i]n the special area of state taxation of Indian tribes and tribal members," the Court has "adopted a *per se* rule" barring such taxation. *Cabazon*, 480 U.S. at 215 n.17; see also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Although Congress may authorize imposition of state taxes on Indian tribes and individual Indians, "it has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Ibid.* (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). The Court has applied this principle in holding that States may not tax income earned by Indians on their reservation, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), Indian-owned personal property situated on the reservation, *Moe; Washington* v. *Confederated Tribes of Colville Indian Reservation* (*Colville*), 447 U.S. 134 (1980); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), or on-reservation sales and purchases by tribal members, *Moe; Colville*. Finally, the relevant statutory framework "must be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe*, 471 U.S. at 766.

b. Under the principles just discussed, it follows *a fortiori* that, in the absence of an Act of Congress ex-

pressly so providing, Yakima County may not tax real property owned in fee by the Yakima Nation or its members within the Yakima Reservation. See *McClanahan*, 411 U.S. at 181 ("the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself"). Yakima County does not appear to contend otherwise. But the County does contend (Pet. 6-7) that application of the ad valorem tax here is sufficiently authorized by Section 6 of the General Allotment Act, as amended in 1906, and by this Court's decision in *Goudy* v. *Meath*, 203 U.S. 146 (1906), which construed certain language in the original version of Section 6. This argument, we believe, is foreclosed by *Moe*.

In *Moe*, Montana argued that Section 6 of the General Allotment Act authorized it to tax transactions occurring on, and Indian-owned personal property situated on, fee lands within the Flathead Reservation. Montana relied on the portion of Section 6, as revised in 1906, stating that "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee * * * then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." Montana pointed out that in *Goudy* v. *Meath*, the Court had rejected the claim of an Indian patentee that State taxing jurisdiction was not among the "laws" to which he and his land had been made subject.[6] "Building on

[6] *Goudy* v. *Meath* arose under the original version of Section 6, which had been construed to confer citizenship on allottees, and to subject them to the full reach of state law, when they first received an allotment and trust patent, rather than at the expiration of the trust period. See *In re Heff*, 197 U.S. 488 (1905). In response to *In re Heff*, Section 6 was amended in 1906 to provide that allottees would not be subject to state law until the expiration of the trust period. See S. Rep. No. 1998, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 3598-3602 (1906). The proviso to Section 6, on which the County relies in this case, was also enacted in 1906.

In re Heff further held that federal laws prohibiting the sale of liquor to Indians were rendered inapplicable when allottees became citizens and were subject to state laws, and indicated that Congress could not regulate sales of liquor to Indians after that time. This

Goudy and the fact that the General Allotment Act has never been explicitly 'repealed,'" Montana argued in *Moe* "that Congress has never intended to withdraw Montana's taxing jurisdiction, and that such power continues to the present." 425 U.S. at 477. The Court found this interpretation of Section 6 "untenable," in light of the IRA's repudiation of the allotment policy and "in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands." *Id.* at 478-479. Thus, the Court in *Moe* squarely rejected the contention that Section 6 of the General Allotment Act and the holding in *Goudy* v. *Meath* permit state taxation of matters occurring on fee lands.

Yakima County seeks to avoid the holding in *Moe*—and to tax the (Indian-owned) fee land itself—by relying on the first proviso to Section 6, which was not quoted in *Moe*. Although the principal clause of Section 6, quoted in *Moe*, states that an allottee shall be subject to state law after expiration of the statutory trust period, the proviso allows the Secretary to issue a fee patent prior to that time if he finds that the allottee is competent and capable of managing his own affairs; the proviso then states that "thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." The County argues (Pet. 6-7) that this portion of the proviso authorizes it to tax Indian-owned fee lands on the Reservation. While it is true that the proviso to Section 6 was not specifically discussed in *Moe*, we believe that the Court's rationale in that case encompasses all of Section 6.

In the first place, if the principal clause of Section 6 is insufficient to authorize state taxation of Indian property and transactions within a reservation's boundaries (as the Court held in *Moe*), it is reasonable to assume that a mere proviso to the principal clause likewise is insufficient to permit state taxation. Cf. *United States* v. *Morrow*, 266 U.S. 531, 534-535 (1925) (a proviso is pre-

aspect of *In re Heff* was overruled in *United States* v. *Nice*, 241 U.S. 591 (1916).

sumed to be confined to the subject matter of the principal clause). That construction of Section 6 as a whole is reinforced by the purpose to be served by the proviso: it simply had the effect of accelerating the date on which the land passed out of trust status, if the allottee was found to be prepared to receive such a patent prior to the date (referred to in the principal clause of Section 6) on which the trust period otherwise would expire. Nothing in Section 6 suggests that such land should be treated differently for purposes of the general principles that govern the application of state tax laws under the current statutory framework allocating jurisdiction over Indian reservations.

Significantly, moreover, it is only the principal clause of Section 6, which was construed in *Goudy* v. *Meath* and quoted in *Moe*, that affirmatively provides that the allottee "shall * * * be subject to" state law when the land passes out of trust status. By contrast, the proviso states only that all "restrictions" on sale, incumbrance and taxation shall be removed. The restrictions referred to obviously are those that were imposed by the General Allotment Act itself, which, by specifying in Section 5 that an allotment was to be held in "trust," 25 U.S.C. 348, protected the individual allottee by protecting his or her property from alienation and taxation. See *United States* v. *Mitchell*, 445 U.S. 535, 543-544 (1980). The lifting of those restrictions imposed by the General Allotment Act itself does not lift *other* barriers to the application of state tax laws; in particular, it does not override the general principles of preemption, confirmed by more modern legislation, that bar the extension of state laws (especially state tax laws) to Indians and their property within the boundaries of an existing reservation—principles that protect not only the individual Indian, but also the sovereignty and economic independence of his or her Tribe. See *United States* v. *Nice*, 241 U.S. 591, 599-600 (1916).

Put another way, the lifting of the General Allotment Act's "restrictions" on taxation permits taxes to be imposed by any governmental entity that otherwise may impose its tax on such lands. For example, if the land is situated outside a reservation, the State or its political subdivisions may tax the land once it is no longer in trust status, even if it is owned by an Indian. But if the land is situated inside a reservation and is owned by an Indian, it is not subject to the State's taxing laws; instead, the lifting of restrictions has the effect of permitting the *Tribe*, as the presiding sovereign, to levy a tax. Cf. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982).[7]

Yakima County's narrow focus on the fact that certain fee lands on the Yakima Reservation were once allotted to individual Indians, and then passed into fee status pursuant to the proviso to Section 6 of the General Allotment Act, ignores the fact that those lands remain within the boundaries of an existing Reservation. The County's submission therefore ignores the "significant geographic component" of tribal sovereignty that undergirds preemption analysis in this area. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 151; compare *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 170-171, with *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 148-150. The Court invoked these principles in *Moe* in holding that the principal clause of Section 6 and *Goudy* v. *Meath*'s interpretation of certain of its language do not authorize the imposition of state taxes on Indians and their property within a reservation. 425 U.S. at 475-477. It follows that the proviso to Section 6 and *Goudy* v. *Meath* (which did not even construe the proviso) likewise do not authorize such an application of state tax laws.

c. This conclusion is reinforced by the evolution of legislation governing Indians and Indian lands. At the time the General Allotment Act was passed, and up to 1948, the term "Indian country" was not defined by statute.[8]

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[7] Of course, the allotment also would be subject to applicable federal taxes when the trust period expired. *Squire* v. *Capoeman*, 351 U.S. 1, 7-8 (1956).

[8] "Indian country" had last been defined in Section 1 of the Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729. That

During that period, "Indian country" typically was thought to include only land owned by Indians, often with the title held in trust by the United States; as a result, when Indian ownership ended, the land was no longer part of Indian country. *Bates* v. *Clark*, 95 U.S. 204, 208-209 (1877); *United States* v. *Celestine*, 215 U.S. 278, 285 (1909); *Solem* v. *Bartlett*, 465 U.S. 463, 468 (1984).[9]

The General Allotment Act and related statutes enacted around the turn of the Century caused the land on many reservations to be allotted. The overall statutory design was that the allotted lands would be held in trust for individual Indians for a number of years, after which fee patents would be issued to the allottees, and excess lands not needed for allotment would be made available to the public under the homestead laws or similar programs. Congress envisioned that at least by the time the allotments were converted to fee status, the reservations would be abolished. *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973); *Solem* v. *Bartlett*, 465 U.S. at 466. Because the ultimate object of the relevant Acts of Congress was to sever the Indians' tribal relations and abolish their reservations, it is not surprising that Congress provided that when fee patents were issued, the allottees would be subject to the laws of the State (including tax laws), in the same manner as non-Indians. In other words, it was anticipated that the allottees' land would, at that time, cease to be Indian country. See 18 U.S.C. 1151(c) ("Indian country" includes "all Indian allotments, the Indian titles to which have not been extinguished").

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provision, however, was not included in the Revised Statutes and was therefore repealed. *Donnelly* v. *United States*, 228 U.S. 243, 268 (1913).

[9] One exception to this principle was that where Congress had set aside a tract of the public domain as an Indian reservation, that tract was automatically Indian country, even if the Indians had never previously occupied the land and had no ownership interest in it. *Donnelly*, 228 U.S. at 268-269.

Much land within Indian reservations passed out of trust status pursuant to the allotment Acts, and much came to be owned by non-Indians. See F. Cohen, *Handbook of Federal Indian Law* 216 (1942). In 1934, Congress passed the IRA, which "repudiated" the policies of the General Allotment Act. *Moe*, 425 U.S. at 479 (quoting *Mattz*, 412 U.S. at 496). In particular, Section 1 of the IRA prohibited further allotments, Section 2 extended indefinitely the trust period of existing allotments, and Section 3 provided for restoration of lands within the boundaries of reservations to tribal ownership. 25 U.S.C. 461, 462 and 463. Consistent with the IRA and the modern statutory policy of maintaining the existence of reservations, set apart from state jurisdiction (with respect to matters affecting Indians), Congress in 1948 enacted a statutory definition of Indian country, which includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, *notwithstanding the issuance of any patent.*" 18 U.S.C. 1151(a) (emphasis added). As the Court explained in *Solem* v. *Bartlett*, 465 U.S. at 468:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. * * * Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See the Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. 1151 (1982 ed.)).

Thus, 18 U.S.C. 1151(a) now codifies the preemptive principle embodied in the "many and complex intervening jurisdictional statutes," enacted since the 1906 revision of Section 6 of the General Allotment Act, that are "directed at the reach of state law within reservation lands." *Moe*, 425 U.S. at 479.[10]

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[10] The court of appeals held that the change in policy manifested by the IRA did not repeal Section 6 of the General Allotment Act. Pet. App. 20a. The court missed the point. There is no suggestion

The court of appeals believed that the definition of Indian country in 18 U.S.C. 1151 applies only to criminal, not civil matters, and that it therefore is not "relevant" to the question whether Indian-owned fee lands may be taxed by the State. Pet. App. 20a-21a, 24a-25a, 26a. The court was mistaken. This Court made clear in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), that "[w]hile Section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." *Id.* at 427 n.2 (citing *McClanahan*, 411 U.S. at 177-178 n.17; *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 424 n.1 (1971); and *Williams* v. *Lee*, 358 U.S. 217, 220-222 nn.5, 6 & 10 (1959)). See also *Cabazon*, 480 U.S. at 207 n.5; *Montana* v. *United States*, 450 U.S. 544, 562 (1981).

d. The court of appeals placed considerable reliance on *Squire* v. *Capoeman*, 351 U.S. 1 (1956), which held that the federal capital gains tax does not apply to the proceeds of timber cutting on trust allotments. Pet. App. 14a-17a. The Court in *Capoeman* rejected the government's submission that the 1906 amendment to the General Allotment Act was intended only to permit state and local taxation of allotments once a fee patent issued, and that federal taxation was permitted prior to that time. 351 U.S. at 7-8. That passage in *Capoeman*—concluding that the government's premise concerning the 1906 amendment should apply to federal as well as state and local taxation—has little to do with this case. The timber cutting and taxation at issue in *Capoeman* occurred in 1943, before the modern definition of Indian country was

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here that Section 6 has been repealed, in whole or in part. Accordingly, if an allotment *outside* a reservation is removed from trust or restricted status, it becomes subject to the full reach of state law, including state tax laws. For allotments and other lands *inside* a reservation, however, the change in the statutory definition of "Indian country" in 18 U.S.C. 1151(a)—and the various Acts of Congress and judicial decisions that culminated in enactment of that definition—changed the effect that Section 6 (including its proviso) otherwise would have.

codified in 18 U.S.C. 1151 and at a time when there was greater uncertainty about the taxability of non-trust property held by Indians within the boundaries of their reservations.[11] Moreover, *Capoeman* involved federal, not state, taxation. Although, as *McClanahan* held, States generally may not tax Indians in Indian country, *all* citizens of the United States are required to pay federal income tax. *Capoeman*, 351 U.S. at 6.

2. Although the court of appeals at first appeared to regard the proviso to Section 6 of the General Allotment Act as sufficient in itself to authorize imposition of the ad valorem tax on fee lands owned by the Yakima Nation or its members, the court did not, in the end, conclude that the proviso necessarily validates that tax, as the County urged below and urges again here. Instead, the court of appeals remanded for the district court to determine whether the ad valorem tax is preempted, under a test drawn from Justice White's opinion in *Brendale*, because it would affect the Yakima Nation in a "demonstrably serious" way. Pet. App. 27a-28a.

The County challenges (Pet. 7-12) the court of appeals' invocation of *Brendale* in this setting. *Brendale* presented a question concerning the assertion of jurisdiction by the *Yakima Nation* over fee lands owned by *nonmembers* of the Yakima Nation. This case presents the converse situation: an assertion of jurisdiction by the *State* (through its political subdivision, Yakima County) over fee lands owned by *members* of the Yakima Nation and by the Nation itself. As a general matter, the question whether the exercise of state jurisdiction over reservation affairs involving Indians is preempted by federal law requires a particularized inquiry into the federal, tribal and state interests at stake. See, *e.g.*, *Cotton Petroleum*, 490 U.S. at 176-177; *Ramah Navajo*,

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[11] See *Bryan* v. *Itasca County*, 426 U.S. at 391 (referring to "a general uncertainty in 1953 of the precise limits of state power to tax reservation Indians respecting other than their trust property"); see also 426 U.S. at 392 n.16.

458 U.S. at 838-839. That test, unlike the one fashioned by the court below based on *Brendale*, does not require a showing that the application of state law would adversely affect the Tribe or its members in a "demonstrably serious" way. Moreover, as explained above (see page 9, *supra*), in the special area of the application of state *tax* laws to Indians and Indian land, the Court has applied a *per se* rule barring such taxation in the absence of express congressional authorization.

For the foregoing reasons, although in our view the court of appeals was properly reluctant to sustain the ad valorem tax as applied to Indian-owned Reservation lands on the basis of the proviso to Section 6 of the General Allotment Act (in light of the adverse impact the tax would have on the Yakima Nation and its members), the court of appeals should not have invoked the *Brendale* formulation to test the validity of the tax. Instead, the court should have applied established principles governing the application of *state* law to on-reservation matters affecting Indians. Accordingly, once the court concluded that Section 6 of the General Allotment Act was insufficient to authorize application of the ad valorem tax irrespective of its impact on the Yakima Nation and individual Indians, it should have invalidated the tax under the *per se* rule applied in *Moe* itself. That is the position urged by the Yakima Nation in its cross-petition. Thus, both the County and the Yakima Nation, as well as the United States as amicus curiae, take the position that the court of appeals erred in applying a *Brendale*-type test in this setting.

Once the *Brendale* test is put to one side, the options presented by the parties are clear-cut: either the ad valorem tax is authorized as a matter of law by the proviso to Section 6 of the General Allotment Act, as Yakima County urges, or the tax is prohibited as a matter of law under the rationale of *Moe*, as the Yakima Nation argues (and as we agree). In our view, that pure question of law is ripe for resolution, and the Court

should grant review here for that purpose, in light of the recurring nature of the problem.[12]

CONCLUSION

The petition and cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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[12] Petitioners also seek review of the court of appeals' holding that the state excise tax may not be imposed on sales of fee land by the Yakima Nation or its members. See Pet. 12-14; Pet. App. 29a-30a. That holding rests on a straightforward application of settled principles regarding state taxation of Indians and their property on a reservation, and the court of appeals' conclusion that the proviso to Section 6 of the General Allotment Act does not allow such taxation does not conflict with decisions of other courts and does not otherwise appear to present a question warranting review by this Court. Accordingly, the Court may wish to limit its grant of certiorari to question 1 presented in the petition and the question presented in the cross-petition (which concern the ad valorem tax). But in order to permit a more comprehensive consideration of issues concerning state taxation of Indian-owned fee lands and matters affecting such lands, we suggest that the grant not be limited.

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